86-1206

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

BENJAMIN WILLIAMS,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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44 pp

QUESTION PRESENTED FOR REVIEW

Whether the State is barred by the Double Jeopardy Clause of the Fifth Amendment from retrying petitioner a third time after the state caused two mistrials by intentionally withholding obviously discoverable evidence from the petitioner.

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OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 290 Ark. 286, 718 S.W.2d 935 (1986), and it is included as Appendix A. It relies on a codefendant's appeal; Woods v. State, 287 Ark. 212, 697 S.W.2d 890 (1985); which is included as

Appendix B.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered November 10, 1986. On January 9, 1987, the due date, Justice Blackmun granted petitioner's motion to enlarge the time to file this petition to January 16, 1987. This petition is thus filed within that time. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The Fourteenth Amendment to the U.S. Constitution, § 1:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On September 28, 1983, petitioner was arrested riding in a car about ten miles from Gurdon, Arkansas on Interstate 30, because the car somewhat matched the description of a getaway car used in a jewelry store robbery earlier that day. The description was a gray Oldsmobile, no license, with two blacks inside. They were stopped on a busy Interstate highway in a gray Buick with a valid Arkansas license plate, with two blacks inside.[1] Driving the car was Stephana Bridges. Petitioner and Bridges were charged in Clark County (Arkansas) Circuit Court with aggravated robbery[2] the following day, September 29,

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[1] The legality of the stop has been litigated in the trial court, but no final order on the stop has been entered which is appealable. In addition, I-30 is a busy highway connecting Little Rock and Dallas.

[2] Ark.Stat.Ann. § 41-2102, a class Y felony punishable by imprisonment for 10 to 40 years or life.

1983. The next day, September 30, 1983, Randolph Wallace and Bruce Allen Woods were separately charged in Clark County Circuit Court with the same alleged crime. Petitioner finally made bond November 25, 1983.

All four of the defendants were joined for trial on the state's motion and set for a jury trial on April 30, 1984.

Petitioner filed a discovery motion specifically requesting statements of all the defendants, the "relationship" between the prosecutor and witnesses (e.g., immunity offers), and all exculpatory (Brady) material. Under Arkansas practice, the first two are required to be disclosed on request without court order. Ark.R.Crim.P. 17.1 (a)(ii) & (b)(iii). Brady material is, of course, to be revealed when its existence is discovered; id. 17.1(d); and the prosecutor is charged with knowledge of the investigating officers. Id. 17.3. There is also a continuing duty to disclose. Id.

19.2. (These rules are reproduced in Appendix C.)

A. The First Mistrial

About a month prior to the trial, petitioner changed attorneys, and that attorney filed a motion for a continuance because he was in trial in other courts around the same time and he felt that he could not possibly prepare by then. The trial court denied the motion by letter to the attorney.

All four defendants appeared for trial April 30th, and a jury was selected, seated, sworn, and excused until the following day. Then, some pretrial motions were considered. Near the conclusion of the hearing while the attorneys were arguing a motion in limine, Arkansas State Trooper Ursery suggested in testimony for the first time that he had a statement from Bridges

and that she would testify for the state.[3] The other three defense attorneys then asked the prosecutor whether or not he had a statement from Bridges since the colloquy indicated that there likely was one. The prosecutor finally admitted that he had tape recorded a statement from Bridges that he had not turned over in discovery because he told Bridges' lawyer that it would not be used until she testified (and apparently only if she contradicted it). The defense attorneys vehemently protested the prosecutor having a statement from a co-defendant which was not turned over in discovery and only revealed at the "eleventh hour." (Id. at 69-70) The trial judge granted the pre-

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[3] Transcript of April 30, 1984 hearing at 66.

The transcript also reveals that the trial judge apparently knew that Bridges would not be tried (id. at 64), but the other defense lawyers did not know it until the prosecutor mentioned what her testimony would be as to some evidence later seized from her car in Little Rock after the arrest. (Id. at 65)

vious defense motion for a continuance before any defendant could even move for a mistrial:

MR. LEE [for petitioner]: We've just found out through this hearing today that a statement was apparently taken from Stephana Bridges. I don't have any statement.

MR. JOHNSON [for Wallace]: At which time she was a co-defendant and was not furnished to us.

MR. LEE: I don't have that and neither does --

THE COURT: I haven't heard anybody say that they took a statement from her.

MR. ACHOR [for Wood]: Ursery.

MR. JOHNSON: Ursery.

THE COURT: No. Ursery did not take a statement from her.

MR. LEE: He said --

THE COURT: Ursery said, "I'm sure she gave one," but said "I was not present, I was not privy and I have not seen one."

MR. ACHOR: Mr. Prosecutor?

MR. ARNOLD [the Prosecuting Attorney]: Sir?

MR. ACHOR: Do you have a statement from Stephana Bridges?

MR. ARNOLD: I do.

MR. ACHOR: We have not been furnished it.

MR. LEE: We have not been provided it.

MR. ACHOR: Do you have a rap sheet on her?

MR. ARNOLD: No, I took one and in other words, it was not released to me until she decided to testify and I'll give you a copy of it.

MR. ACHOR: Wait a minute. You took a statement from her at a time she was a Co-Defendant, it's not discretionary whether you release it or not. That's a statement of a Co-Defendant. That's guaranteed.

MR. ARNOLD: I took this statement with her lawyer present.

MR. ACHOR: When?

MR. ARNOLD: In other words--the other day. In other words, he was agreeable I would introduce--I would use it if she agreed to testify. If not, it would be of no value.

MR. ACHOR: Then Brady v. Maryland applies.

MR. LEE: We're entitled to a statement of a Co-Defendant.

MR. ARNOLD: I'll give you a copy of it.

MR. ACHOR: At the eleventh hour.

MR. ARNOLD: I told you she was going to testify.

MR. LEE: But, we didn't know anything

about a statement until Ursery said there probably is one and now you're saying there for sure is one.

MR. ARNOLD: I took it.

MR. ACHOR: Brady v. Maryland gives us that statement immediately.

MR. ARNOLD: Well, you're getting it. I just got it.[4]

MR. LEE: Well, we've got no--absolutely no way to be able to disseminate that statement at the eleventh hour and prepare for a Wednesday trial after the jury has already been selected.

THE COURT: You are right gentlemen. I'm sorry, but I'm going to have to grant your request for a continuance. I don't like it.

MR. ARNOLD: Judge, I told them she was going to testify.

THE COURT: I know you told them she was going to testify, but if she gave you a statement, it should have been made available to them.

MR. ARNOLD: I've just got it transcribed.

THE COURT: They filed a motion for discovery. You responded to them. You have updated them, but you have not given them a copy of that statement. [Id. at 68-71]

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[4] The transcript of this statement was not finally turned over until June 11, 1984.

The Arkansas Supreme Court below (actually in co-defendant Woods' appeal; Woods v. State, supra) characterized this colloquy as responding to the original defense motion for a continuance. The continuance motion had been made by petitioner because his lawyer had only been on the case for a month. The trial judge ended the proceeding and discharged the jury before any defendant moved for a continuance or mistrial on that ground. After the second mistrial, the judge made a docket entry changing this "continuance" notation to "mistrial."

B. The Second Mistrial

The case was set for retrial on August 27, 1984, and the remaining three co-defendants moved to dismiss claiming double jeopardy. The motion was denied.

They proceeded to trial, and, after several witnesses testified, it was learned through defense cross-examination of a

state's witness that there had been a photo array (which, incidently, involved two photographs of petitioner[5]) viewed by an alleged eyewitness (not named in reports) who could make no identification. This was clearly exculpatory evidence under Brady which the state was required to disclose before trial without any demand by the defense.[6] The defendants then moved for a mistrial, and it was at first denied.

The discourse continued. It was learned that Ursery conducted the photo lineup in the presence (at least in part) of the prosecutor who had taken a personal interest in the investigation, and that he omitted a reference to this witness who could not identify the defendant from his report. The prosecutor claimed he had no knowledge

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[5] This is another potential error which has not been finally resolved so as to be appealable.

[6] Brady v. Maryland, 373 U.S. 83 (1963); Ark.R.Crim.P. 17.1(a).

that the witness had viewed the lineup, but he had subpoenaed the witness twice for trial (August 27, 1984 trial transcript at 492). However, the prosecutor's claim of lack of knowledge is contradicted by the record because another eyewitness testified shortly before that the prosecutor was present when she saw the photo array at 5:55 p.m.[7] If he had subpoenaed this witness twice and had minimally prepared for trial, the prosecutor had to be aware the witness saw a photo array at 6:04 p.m.

The only inference which can be drawn from the facts is that the prosecutor put the witness on the stand knowing of the failed identification. The prosecutor took a personal interest in the case and its in-

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[7] Id. at 131 (report showing time witnesses viewed three photo lineups at 5:55, 6:04 and 6:23 pm), 453 (testimony of Mrs. Wells that prosecutor was present at her viewing), 455 (statement of prosecutor that the only one he saw was Mrs. Osborne's [at 5:55 p.m.] which was nine minutes before the failed identification).

vestigation and was present at the photo lineups conducted by Ursery the night of September 29, 1983 between 5:55 and 6:23 pm with the victims.

The trial court recognized the fact a mistrial would present a double jeopardy argument, and the court invited review of the question. Id. at 496-500.

C. The Appeal Below

The defendants filed a notice of appeal of the denial of the double jeopardy motion, but they did not pursue the appeal. Instead, they filed a motion to dismiss, which was denied and then appealed. This was the proper procedure because the Arkansas Supreme Court reached the merits, and the state did not challenge the procedure followed.

Defendant Woods' motion was filed, denied, and on appeal before petitioner and Wallace filed theirs in early October 1985.

Woods' appeal was decided by the Arkansas Supreme Court on October 21, 1985 affirming the order denying the double jeopardy defense holding that a third trial was not barred. Woods v. State, 287 Ark. 212, 697 S.W.2d 890 (1985) (App.B).

Petitioner's and Wallace's motion raised the additional ground that they were denied a speedy trial. On October 23, 1985, the trial court denied the motion, and they appealed.

The Arkansas Supreme Court affirmed on November 10, 1986. Williams v. State, 290 Ark. 286, 718 S.W.2d 935 (1986) (App.A). The double jeopardy claim was denied by a one sentence reference to Woods v. State, supra (App. B). The speedy trial issue was also decided against them, but that is a state law issue not before this Court.

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF OREGON V. KENNEDY TO REPEATED INTENTIONAL ACTS OF PROSECUTORIAL MISCONDUCT CAUSING MISTRIALS IS AN IMPORTANT QUESTION WHICH NEEDS TO BE RESOLVED BY THIS COURT.

A.

Prior to Oregon v. Kennedy, 456 U.S. 667 (1982), the State's conduct in causing two mistrials by its intentional withholding of obviously discoverable evidence (i.e., first, a co-defendant's statement, and, second, exculpatory identification evidence) would clearly have required imposition of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution to bar his third trial (second retrial). See, e.g., United States v. Dinitz, 424 U.S. 600, 611 (1976):

> The Double Jeopardy Clause does protect a defendant against governmental

> actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," United States v. Jorn, supra, 400 U.S. at 485, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. Downum v. United States, 372 U.S. at 736. See Gori v. United States, 367 U.S., at 369; United States v. Jorn, supra, 400 U.S. at 489 (Stewart, J., dissenting); cf. Wade v. Hunter, 336 U.S., at 692.

In Oregon v. Kennedy, a majority of the Court held that the Double Jeopardy Clause will bar retrial of a criminally accused only where the state intentionally provokes the accused into seeking a mistrial. 456 U.S. at 679. Kennedy involved a mistrial that was caused by the prosecutor's bad judgment in asking an inappropriate question which somehow led to a mistrial. In almost all jurisdictions, the conduct would not have risen to the level of prosecutorial misconduct. Nevertheless, the Court went so far as to create a rule that was

not necessarily justified by the facts of the case. All nine Justices agreed on the judgment (reversal), but the Court produced four separate opinions and was sharply divided on its rationale.

Justice Stevens concurred in the judgment (joined by Justices Brennan, Marshall, and Blackmun), but he flatly disagreed with the majority's rationale that prosecutorial misconduct alone cannot justify application of the Double Jeopardy Clause. Id. at 681 (STEVENS, J., concurring in the judgment). The conduct of the state here would satisfy any standard recognized in Justice Stevens' concurrence.

The key to applying Kennedy is Justice Powell's separate opinion also concurring in the judgment. Id. at 679 (POWELL, J., concurring). Justice Powell would find determinative "factual evidence of intent beyond the [act causing the mistrial] itself" and circumstances from which a bad faith

intent can be inferred. Things he found which did not support a finding of intent to prejudice the accused in that case were: (1) the lack of a "sequence of overreaching prior to the single prejudicial question," and (2) the fact the prosecutor resisted the mistrial and was surprised by the turn of events. Id. at 680 (POWELL, J., concurring).

B.

The facts of this case take it far beyond those in Oregon v. Kennedy. Here we have two intentional acts of the prosecutor to withhold clearly discoverable evidence from the petitioner and his co-defendants which aborted two separate jury trials.

In the first mistrial, the prosecutor revealed, only when put on the spot by a question from a defense lawyer, that he previously had taken a statement from a co-defendant which the police witness was

aware of but about which the prosecutor did not tell the defense because of an agreement with the witness' lawyer to keep it undisclosed until she testified. The trial judge chided the prosecutor for withholding it and not complying with the continuing duty to disclose, and the only excuse offered by the prosecutor was "I've just got it transcribed." He was ordered to turn it over. (He finally did so nearly two months later.)

The second trial was held four months later. While eyewitnesses were testifying, the defense unearthed during cross-examination the fact that a second eyewitness to the robbery failed to identify petitioner even though petitioner was in two photographs in the photo array. (A previous witness made an in-court identification of another defendant but was cross-examined about her known failure to make a photo identification the day after the crime.)

When it was revealed another witness had not made an identification, all three of the remaining defendants moved for a mistrial because of withheld exculpatory evidence, and it was at first denied. But, after a lengthy discussion, it was granted. The prosecutor claimed no knowledge of the particular witness viewing a photo array, but the other witneses put him there personally participating, and he had twice called this witness to testify for the State. At one point, his denial of knowledge sounded more like he was trying to blame the defense for not interviewing that witness and finding out on their own.

C.

This case fits within Justice Powell's concurrence in Kennedy, and Justice Powell would find the Double Jeopardy Clause applicable.

First, there is a "sequence of overrea-

ching" in that the prosecutor was twice caught in separate trials with not disclosing discoverable evidence. This sequence not only supports an inference of overreaching, it proves that discovery rules are manipulated against the accused by the State in that jurisdiction without recourse to the accused.

Second, there was no surprise by the prosecutor. In the first mistrial, the prosecutor admitted withholding discoverable evidence and lamely offered the fact it was not transcribed for its non-disclosure. In the second mistrial, the prosecutor claimed no knowledge of the failed identification but was shown to be participating in the photo lineups.

Finally, he never acted suprised or protested the mistrials.

D.

This case gives the court the opportun-

ity to give meaning to Oregon v. Kennedy. A review of the cases applying Kennedy[8] is revealing. In the five years since Kennedy was decided, the box score is this: Prosecution, 200; Criminally Accused, 1.[9] No one can meet the "unrealistic and impractical"[10] standard in Kennedy.

In Illinois v. Somerville, 410 U.S. 458, 467 (1973), the Court, speaking through

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[8] Kennedy was run through Shepard's™ and Westlaw™, and probably 200 cases discussing the double jeopardy issue were found--one case went for the defendant under federal law. See note 9 infra.

[9] We would like to be able to argue a conflict in decisions, but the only case which could be found which found prosecutorial misconduct sufficient to invoke the Double Jeopardy Clause of the Fifth Amendment after Kennedy was not from the highest court of that state: People v. Copeland, 129 Misc.2d 250, 492 N.Y.S.2d 853 (1985) (Queens Co. Sup. Ct., Crim. Term, Part J-14). One U.S. District Court decision found Kennedy satisfied in a habeas case, but the holding was vacated because of lack of exhaustion of state remedies. Petrucelli v. Smith, 544 F.Supp. 627, 631-34 (W.D. N.Y. 1982), vacated sub nom. Petrucelli v. Coombe, 735 F.2d 684 (2d Cir.1984).

[10] B. Gershman, Prosecutorial Misconduct § 11.8(e)(1), at 11-28 (1985).

(then) Justice Rehnquist, said that "rigid, mechanical rule[s]" of double jeopardy review should be avoided. The rule in Kennedy is just that. It is a bright line rule that is always out of reach. The fact no one can meet the Kennedy standard proves it needs clarification.

E.

This case requires the Court to apply the Double Jeopardy Clause because there is no remedy to prevent the state from manipulating the system in similar cases to put the defendant through three, four, or even five trials in its half-hearted attempts to comply with discovery laws. It is precisely this type of misconduct and manipulation that the Double Jeopardy Clause should be held to prevent.[11]

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[11] J. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 35 (1969):

"The moral sentiment which double jeo-

Unless Kennedy is clarified, it is highly likely the Double Jeopardy Clause will become obsolete in all but the most egregious cases.[12]

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pardy exemplifies is the feeling that no man should suffer twice for a single act. This sentiment is to be found among the Roman jurists, the canon lawyers, and the legal writers of many other traditions. However, a moral sentiment is not a sufficient guide for the formulation of public policy. In its modern environment double jeopardy must deal with the interrelationship between substantive criminal law and the legal powers of the public prosecutor to select the categories of punishment. In order to define that relationship, legislatures could establish the legal pattern. If legislatures fail to act, it is necessary for courts to control the policy by employing the most available instrument, which is the double jeopardy clause. If neither the legislature nor the courts performed the task, the frequency of repeated criminal suits for the same conduct would be greatly increase."

[12] Id. at 37:

"History has given American law a double jeopardy concept as a part of its most fundamental principles. That concept, which is directed towards the protection of the criminal defendant and against the state's power, is the product of innumerable cases and writings. But history alone cannot determine the content of the double jeopardy ideal. The conflicting needs of society and the individual which are inherent

C O N C L U S I O N

The petition for writ of certiorari should be granted.

Respectfully submitted,

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in double jeopardy must be resolved by each generation. A reconsideration of the policy may reveal that its basis has disappeared, or the contrary. A continued neglect of the task may cause the concept to become obsolescent."

A P P E N D I C E S

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Appendix A

Benjamin WILLIAMS and Randolph WALLACE
v. STATE of Arkansas

CR 86-118

Supreme Court of Arkansas
Opinion delivered November 10, 1986

1. CRIMINAL PROCEDURE — SPEEDY TRIAL — COMPUTATION OF TIME. — In accordance with A.R.Cr.P. Rule 28.2, the time for trial commences to run, without demand by the defendant, from the date of the information or arrest, whichever is earlier.
2. CRIMINAL PROCEDURE — SPEEDY TRIAL — COMPUTATION OF TIME AFTER MISTRIAL. — If the defendant is to be retried, following a mistrial, the time for trial shall commence running anew from the date of the mistrial. [A.R.Cr.P. Rule 28.2(c).]
3. CRIMINAL PROCEDURE — SPEEDY TRIAL — EXCLUDED PERIODS. — Periods of delay resulting from continuances granted at the request of the defendant and interlocutory appeals are excluded in computing the time for trial. [A.R.Cr.P. Rule 28.3.]
4. CRIMINAL PROCEDURE — SPEEDY TRIAL — BURDEN ON STATE TO SHOW GOOD CAUSE FOR DELAY. — The burden is upon the state to show good cause for delay if the accused is not brought to trial within the time limitations established in the speedy trial rules.
5. CRIMINAL PROCEDURE — SPEEDY TRIAL — TRIAL HELD IN LESS THAN ONE YEAR. — Where a mistrial was declared August 27, 1984, and an interlocutory appeal was filed the same day, but the record was never filed in the Supreme Court, the time for calculating a speedy trial did not start running anew until January 24, 1985, the last date on which the appellants could have lodged the record on appeal, and less than one year elapsed by October 23, 1985, the date the order being appealed from was filed.

6. CRIMINAL PROCEDURE — SPEEDY TRIAL — STATE'S BURDEN TO JUSTIFY ANY DELAY BEYOND ESTABLISHED RULES. — The burden is upon the state to prove justification for any delay beyond the established rules.

Appeal from Clark Circuit Court; *J. Hugh Lookadoo*, Judge; affirmed.

William C. McArthur, for appellant Benjamin Williams.

Paul Johnson, for appellant Randolph Wallace.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. On September 29, and 30, 1983, the appellants and two other individuals, Allen Bruce Woods and Stephana Bridges, were charged with an aggravated robbery that occurred on September 28. Both appellants Williams and Wallace were released on bond on November 28, 1983. The state filed amended informations charging the appellants as habitual offenders and also filed a motion to join the defendants. Both of the appellants moved for continuances.

On April 30, 1984, the first trial of the appellants and Woods commenced, but before the first witness was sworn it was discovered that the state had taken a statement from codefendant Bridges, who was not being tried with the three men. This information had not been previously divulged to the defense. On motion of the defense, the case was "continued." By order of the trial court dated March 15, 1985, the court granted the defendants' motion for a mistrial in the April 30, 1984 proceedings.

The second trial commenced on August 27, 1984. Both appellants moved to dismiss, asserting that forcing them to trial constituted double jeopardy. The court denied the motion. This trial also resulted in a mistrial after it became apparent that the state had not revealed to the defense that a witness to the robbery had viewed a photo lineup and had failed to identify any of the defendants. Notice of appeal of the denial of the double jeopardy motion was filed by the appellants that same day.

On November 26, 1984, the appellants filed a motion to extend the time to lodge the record on appeal until January 24, 1985. The trial court granted this motion. The record was never

filed.

On January 2, 1985, the appellants again filed a motion to dismiss, asserting that forcing them to trial constituted double jeopardy. The trial court refused to consider this motion because "the court considers these cases on appeal."

In early October, 1985, the appellants once again filed motions to dismiss on double jeopardy grounds. The appellants also asserted a violation of their right to a speedy trial under Arkansas Rules of Criminal Procedure Rule 28.1. These motions were denied by the trial court by an order dated October 23, 1985. It is from this order that the present appeal is taken.

On October 21, 1985, this Court handed down our decision in *Woods* v. *State*, 287 Ark. 212, 697 S.W.2d 890 (1985), wherein we held that co-defendant Woods had not been twice placed in jeopardy. The appellants concede that their arguments on this point were decided adversely to them in *Woods*.

The only issue in this appeal, therefore, is whether the appellants were denied a speedy trial as required by A.R.Cr.P. Rule 28.1. Jurisdiction is in the Supreme Court pursuant to A.R.Cr.P. Rule 28.1(d) and Supreme Court Rules 29(1)(f) and 29(1)(k).

[1-4] In accordance with A.R.Cr.P. Rule 28.2, the time for trial commences to run, without demand by the defendant, from the date of the information or arrest, whichever is earlier. Further, if the defendant is to be retried, following a mistrial, the time for trial shall commence running anew from the date of the mistrial. A.R.Cr.P. 28.2(c). Periods of delay resulting from continuances granted at the request of the defendant and interlocutory appeals are excluded in computing the time for trial. A.R.Cr.P. Rule 28.3. The burden is upon the state to show good cause for delay if the accused is not brought to trial within the time limitations established in our speedy trial rules. *Chandler* v. *State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

[5] Had no appeal been taken from the order denying the double jeopardy motions on the day of the second mistrial, the time would have commenced running again on that date, August 27, 1984. However, the period of delay resulting from this interlocutory appeal, August 27, 1984, to January 24, 1985, must

be excluded from the time used to compute the speedy trial issue. Starting anew from the latter date, it is obvious that less than one year had elapsed by October 23, 1985, the date the order being appealed from here was filed.

[6] From the foregoing timetable, it is clear that the appellants were not denied their right to a speedy trial. The time during which the interlocutory appeal was pending must be excluded. It would be unfair to the state to reduce the excludable period to anything less than the last date on which the appellants could have lodged the record on appeal. The burden is upon the state to prove justification for any delay beyond the established rules. *Williams* v. *State*, 275 Ark. 8, 627 S.W.2d 4 (1982). It is apparent from the record that the delays were the result of the action of the appellants. Therefore, the trial court correctly overruled the motions to dismiss for lack of a speedy trial.

Affirmed.

Appendix B

Allen Bruce WOODS *v.* STATE of Arkansas

CR 85-89

Supreme Court of Arkansas
Opinion delivered October 21, 1985

1. CRIMINAL LAW — DOUBLE JEOPARDY — WHEN FORMER PROSECUTION IS AN AFFIRMATIVE DEFENSE. — Ark. Stat. Ann. § 41-106 (Repl. 1977) codifies the law on double jeopardy and provides in part that a former prosecution is an affirmative defense if it was terminated without the express or implied consent of the defendant after the jury was sworn or, if trial was before the court, after the first witness was sworn, unless the termination was justified by overruling necessity.
2. TRIAL — EXPRESS CONSENT BY DEFENDANT TO TERMINATE TRIAL — WHEN IT OCCURS. — Express consent occurs when the defendant moves to terminate the trial or agrees to termination on motion of

the court or the state.

3. TRIAL — IMPLIED CONSENT BY DEFENDANT TO TERMINATE TRIAL — WHEN IT OCCURS. — Consent is implied if the defendant fails to object to termination of the trial and the termination is for the benefit of the defendant; if the termination is for the benefit of the state, mere failure to object does not constitute consent.
4. TRIAL — REQUEST BY DEFENSE FOR CONTINUANCE — CONSENT IMPLIED. — Where it is clear that the defense requested a continuance, the continuance was for the benefit of the defense, and it was granted without objection, consent will be implied.

Appeal from Clark Circuit Court; *J. Hugh Lookadoo*, Judge; affirmed.

Herman H. Hankins, Jr. and *Steven G. Beck*, for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. In September, 1983, Allen Woods and three others were charged with aggravated robbery. A trial on this charge has not yet been completed and Woods brings this interlocutory appeal on the grounds of double jeopardy.

In April, 1984 a jury was selected and sworn in, but before testimony began it was discovered that the prosecution had taken a statement from one of the co-defendants but had not furnished it to the other defense attorneys as required by A.R.Cr.P. Rule 17.1. A continuance was granted and the jury was discharged.

A second trial was scheduled in August, 1984. Prior to jury selection the defense moved for dismissal on the grounds of double jeopardy as a result of the termination of the earlier trial. The motion was denied and a second jury was selected and sworn in. The discharging of the original jury and the selection of another gave the continuance the practical effect of a mistrial, see *Daniels* v. *State*, 12 Ark. App. 251, 674 S.W.2d 949 (1984), and that is not a point of contention in this case. The August trial began but after testimony by several witnesses, a mistrial was declared because of exculpatory testimony given by one of the witnesses. The defense requested this mistrial and there is no double jeopardy claim here.

Before proceeding with the third attempt at trial, a motion for dismissal was again made by the defense on double jeopardy

grounds based on the termination of the first trial. The motion was denied and this appeal followed, pursuant to ARAP 3. See *Jones* v. *State*, 230 Ark. 18, 320 S.W 2d 645 (1959).

[1-3] Ark. Stat. Ann. § 41-106 (Repl. 1977) codifies the law on double jeopardy and provides in part:

> Former prosecution — Same offense. A former prosecution is an affirmative defense to a subsequent prosecution for the same offense under any of the following circumstances:
>
> ****
>
> (3) The former prosecution was terminated without the express or implied consent of the defendant after the jury was sworn or, if trial was before the court, after the first witness was sworn, unless the termination was justified by overruling necessity.

The Commentary to that section explains:

> Express consent occurs when the defendant moves to terminate the trial or agrees to termination on motion of the court or the state. The Model Penal Code declined to take a stand on whether mere failure to object to termination constitutes implied consent. Fortunately, the Arkansas Supreme Court has addressed the issue, developing what the Commission felt was a workable definition of implied consent. See, *Franklin* v. *State*, 149 Ark. 546 (1921); *Burnett* v. *State*, 76 Ark. 295 (1905). Consent is implied if the defendant fails to object to termination and the termination is for the benefit of the defendant. If the termination is for the benefit of the state, mere failure to object does not constitute consent.

Appellant argues that no express consent was given and, alternatively, that the termination was not for his benefit but for the benefit of the state and, hence, his failure to object does not constitute an implied consent. We reject the argument. The record at the first trial (pp. 248-253) reveals an extended dialogue in chambers between defense counsel, the prosecutor and the trial judge over a statement the prosecutor had taken from one of the co-defendants which had not been furnished to the other defen-

dants until the morning of trial. The discussion concluded with this exchange:

BY MR. LEE (defense counsel):

But, we didn't know anything about a statement until Ursery said there probably is one and now you're saying there for sure is one.

BY MR. ARNOLD (prosecuting attorney):

I took it.

BY MR. ACHOR (defense counsel):

Brady vs. *Maryland* gives us that statement immediately.

BY MR. ARNOLD:

Well, you're getting it. I just got it.

BY MR. LEE:

Well, we've got no—absolutely no way to be able to disseminate that statement at the eleventh hour and prepare for a Wednesday trial after the jury has already been selected.

BY THE COURT:

You are right, gentlemen. I'm sorry, but I'm going to have to grant your request for a continuance. I don't like it.

BY MR. ARNOLD:

Judge, I told them she was going to testify.

BY THE COURT:

I know you told them she was going to testify, but if she gave you a statement, it should have been made available to them.

BY MR. ARNOLD:

I've just got it transcribed.

BY THE COURT:

They filed a motion for discovery. You responded to them. You have updated them, but you have not given them a

copy of that statement.

[4] Although no consent was literally stated, reading the colloquy as a whole, it is clear the defense was requesting a continuance from the court, which was granted. No other interpretation is plausible.

Even if we could agree with appellant that no actual consent was expressed, the argument must fail because the continuance was for the benefit of the defense and was granted without objection, and in that circumstance consent will be implied. The objections to the co-defendant's statement and the avowed need for more time were specifically stated by the defense. The continuance was obviously granted to enable the defense to adequately prepare for trial. See *McGill* v. *State*, 209 Ark. 85, 189 S.W.2d 646 (1945); *Franklin* v. *State*, 149 Ark. 546, 233 S.W. 688 (1921).

Affirmed.

PURTLE, J., not participating.

Appendix C

SELECTED PORTIONS OF THE

ARKANSAS RULES OF CRIMINAL PROCEDURE

Rule 17.1. Prosecuting Attorney's Obligations

(a) Subject to the provisions of Rules 17.5 and 19.4 [inapplicable here], the prosecuting attonrey shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial;

(ii) any written or recorded statements and the substance of any oral statements made by a defendant or a codefendant;

. . .

(b) The prosecuting attorney shall, upon timely request, inform defense counsel of:

. . .

(iii) the relationship to the prosecuting authority of persons whom the prosecuting attorney intends to call as witnesses.

. . .

(d) Subject to the provisions of Rule 19.4 [inapplicable here], the prosecuting attorney shall, promptly on discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Rule 17.3. Material Held by Other Governmental Personnel

(a) The prosecuting attorney shall use diligent, good faith efforts to obtain material in the possession of other governmental personnel which would be discoverable if in the possession or control of the prosecuting attorney, upon timely request and designation of material or information by defense counsel.

Rule 19.2. Continuing Duty to Disclose

If before trial, but subsequent to compliance with these reules, or an order entered pursuant thereto, a party discovers additional material or information comprehended by a previous request to disclose, he shall promptly notify opposing counsel or the other party of the existence of such amterial or information. If additional material is disclosed during trial, the party shall notify the court and opposing counsel of the existence of the material or information.

86-1206

Supreme Court, U.S.
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CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

BENJAMIN WILLIAMS.....PETITIONER

V.

STATE OF ARKANSAS.....RESPONDENT

ON PETITION FOR WRIT OF
CERTIORARI TO THE
ARKANSAS SUPREME COURT

BRIEF FOR RESPONDENT

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ATTORNEYS FOR RESPONDENT

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REASON FOR DENYING THE PETITION FOR CERTIORARI

I.

THE ISSUE RAISED BY PETITIONER IS NOT PROPERLY BEFORE THIS COURT.

Petitioner Williams, citing Oregon v. Kennedy, 456 U.S. 667 (1982), argues that

the prosecutor in the instant case intentionally provoked the accused into seeking a mistrial, thus barring his retrial under the Double Jeopardy Clause. This specific argument is raised by Williams for the first time before this Court. In Arkansas, as a matter of appellate practice, issues not argued on appeal are considered waived. Shockley v. State, 282 Ark. 281, 668 S,.W.2d 22 (1984). Because Williams failed to follow Arkansas' appellate procedure, he cannot pursue the issue before this Court on review by writ of certiorari. Beck v. Washington, 369 U.S. 541, 549-54 (1962). Williams cannot argue that the Arkansas Supreme Court must necessarily have decided the specific issue he now raises, in its opinion in Woods v. State, 287 Ark. 212, 697 S.W.2d 890 (1985), which turns on an entirely different issue of double jeopardy.

Further, because Williams did not raise the issue of prosecutorial misconduct at the trial court level, he failed to comply with Arkansas' contemporaneous objection rule. See Fretwell v. State, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986) and Wicks v. State, 270 Ark. 781, 785-87, 606 S.W.2d 366, 369-70 (1980). If a petitioner completely fails to make a proper objection in state court to an alleged violation of one of his rights guaranteed by the United States Constitution, this Court will not consider an argument addressing the alleged deprivation when raised for the first time before this Court on review by writ of certiorari. Moore v. Illinois, 408 U.S. 786, 799 (1972); Cardinale v. Louisiana, 394 U.S. 437 (1969); and Street v. New York, 394 U.S. 576, 582 (1969).

CONCLUSION

THEREFORE, because the issue now raised is not reviewable, respondent respectfully requests that this Honorable Court deny petitioner Williams' petition for writ of certiorari to the Supreme Court of Arkansas.

Respectfully submitted,

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(3)

No. 86-1206

IN THE

Supreme Court of the United States

October Term, 1986

BENJAMIN WILLIAMS,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITIONER'S REPLY BRIEF

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A R G U M E N T

The State mischaracterizes petitioner's argument as not properly before the court. Quite to the contrary, it is properly before the Court because the Fifth Amendment double jeopardy claim has been raised at every point in this case since the issue arose.

A. We omitted to mention in our Petition for Writ of Certiorari a procedural step, which, while not critical to the merits of the case, demonstrates that the issue has been properly raised.

Prior to the August 27, 1984 trial and the denial of the motion to dismiss for double jeopardy, petitioner and co-defendant Wallace sought a temporary stay from the Arkansas Supreme Court by writ of prohibition raising the Fifth Amendment argument. The Arkansas Court "denied [the writ] for want of a record showing the proceedings that occurred when a continuance was

assertedly granted by the trial court on April 23, 1984. This ruling is without prejudice to the petitioner's [sic] right to raise the issue on appeal."[1] *Williams and Wallace v. State*, No. CR 84-148 (Aug. 27, 1984) (bracketed material added). The Petition for Writ of Prohibition clearly raised Fifth Amendment double jeopardy as a bar to retrial.

On denial of the writ, the double jeopardy motion was immediately reasserted in the Clark County Circuit Court (filed Aug. 27, 1984). That motion was denied and the jury trial proceeded to the point of the mistrial which is at issue here.

B. When the Arkansas Supreme Court decided the case on the appeal of the denial of the double jeopardy plea, it completely ignored the Fifth Amendment argument raised by the appellants and decided the case on statutory grounds finding that the peti-

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[1] Which they did and lost.

tioners consented to a mistrial by moving for it. *See* Ark.Stat.Ann. § 41-106(3) and *Commentary* quoted in *Woods v. State*, 287 Ark. 212, 214, 697 S.W. 2d 890, 891 (1985).

The constitutional challenge was thus preserved for review.

C. *Oregon v. Kennedy*, 456 U.S. 667 (1982), was not cited below by either side to either case (petitioner's and Wallace's or Woods'). The appellants below cited *United States v. Dinitz*, 424 U.S. 600 (1976):

> The double jeopardy clause does protect an accused against governmental actions intended to provoke mistrial requests and bars retrial where there is "bad faith conduct by judge or prosecutor." *Dinitz, supra*, [96 S.Ct.] at 1081.

Appellant's Brief in *Woods v. State* (filed July 10, 1985) at 30. It was further argued that the sole purpose of the continuance was to cut off an appellate argument on the State's discovery failure which would have resulted in reversal and, *citing Dinitz*, that the continuance was calculated

to give the State a more favorable opportunity to convict on retrial. *Id.* at 31. Thus, it was argued, the double jeopardy clause of the Fifth Amendment barred retrial. *Id.* at 32.[2]

The State's response was simply that a construction of § 41-106 did not bar retrial, and it never addressed the Fifth Amendment argument. The State should have cited *Kennedy* below but did not.

D. If petitioner argued here that *Dinitz* and its line of cases barred retrial witout citing *Kennedy*, that would have been poor lawyering not to anticipate and frame the issue properly, and the State would have responded requesting that the Petition be denied merely citing *Kennedy*.

By our citing Kennedy and addressing this issue head-on, an issue that they declined to raise below in defense of the

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[2] After *Woods* was decided, petitioner and Wallace conceded law of the case applied to their argument.

judgment appealed from, which necessarily has to be addressed by petitioner in this court, the State argues the issue is not properly before the court. In other words, because the State and Arkansas Supreme Court closed their eyes to the constitutional issue below, this court should too.

The issue raised in the Petition needs to be resolved by this Court, and the State cannot make it go away.

C O N C L U S I O N

The Fifth Amendment double jeopardy issue is properly before this Court, and it was properly before the Arkansas Supreme Court. The Petition for Writ of Certiorari to the Arkansas Supreme Court should thus be granted.

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